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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PETER LIVINGSTON,

Plaintiff and Appellant,

v.

JAMES P. BALLANTINE,

Defendant and Respondent.

2d Civil No. B250110  
(Super. Ct. No. 1416427)  
(Santa Barbara County)

Peter Livingston appeals from a dismissal entered in favor of defendant Attorney James P. Ballantine after the trial court struck appellant's fraud complaint as a SLAPP suit (strategic lawsuit against public participation). (Code Civ. Proc., §425.16.)<sup>1</sup> We affirm on the ground that the action arises from a protected speech activity. (§ 425.16, subd. (e)(2); *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 480.) Appellant cannot demonstrate a probability of prevailing on the fraud claim because the action is barred by the litigation privilege. (Civ. Code, § 47, subd. (b)(2).)

*Facts and Procedural History*

In 2006 appellant sued Winston Sullivan for construction work performed at Tutti's Off Main Restaurant in Ventura. (Ventura County Super. Ct., Case No. CV240181) The restaurant was owned and operated by Off Main, Inc., a California corporation which

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise stated.

was previously sued for the construction work. (Ventura County Super. Ct, Case No. CV245412.)

### *The Bankruptcy Action*

On February 14, 2007, a bankruptcy specialist (Attorney David Commons) filed a Chapter 7 bankruptcy petition on Sullivan's behalf. (United States Bankruptcy Court, Central District of California, Case No. 9:07-bk-10189-RR.) Appellant was not listed as a creditor in the bankruptcy papers; nor did he receive notice of the bankruptcy proceeding.

While the bankruptcy was pending, Sullivan hired Ballantine to represent him in the state action and a mediation of the construction work dispute. At no time during the mediation, did Sullivan or Ballantine mention the bankruptcy. On July 10, 2007, Sullivan executed a settlement agreement to pay appellant \$1,000 a month for 36 months and a \$34,000 balloon payment. After Sullivan defaulted on the balloon payment, appellant filed a new action to collect the unpaid amount and obtained a \$41,874 judgment, none of which was paid.

### *The Present Action*

In August 2012, appellant learned about the Chapter 7 bankruptcy and was told that the bankruptcy trustee sold Sullivan's house and paid the balance of the sale proceeds (\$380,000) to Sullivan. Appellant sued Ballantine for damages based on the theory that that Ballantine committed a fraud by not advising appellant of the bankruptcy during the 2007 mediated settlement. Appellant claimed that Ballantine's failure to file a notice of bankruptcy stay violated California Rules of Court rule 3.650(a) and Business and Professions Code section 6128 which makes it a misdemeanor for an attorney to "consent[] to any deceit or collusion with the intent to deceive the court or any party."

Ballantine brought a motion to dismiss on the ground that his representation of Sullivan was a protected speech activity under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Granting the motion, the trial court found that the fraud action was based on communicative conduct in a judicial proceeding (Civ. Code, § 47, subd. (b)(2)) and that appellant had no probability of prevailing on the action.

### *The Anti-SLAPP Statute*

In analyzing a section 425.16 motion, the trial court engages in a two step process. (*Silk v. Feldman* (2012) 208 Cal.App.4th 547, 553.) First, the court decides whether defendant has made a threshold showing that the challenged action arises from defendant's exercise of his right of petition or free speech. (*Ibid.*) If defendant makes such a showing, the court then decides whether plaintiff has demonstrated a probability of prevailing on the action. (*Ibid.*) These determinations are legal questions, which we review do novo. (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5.)

### *Protected Speech Activity*

The first prong was satisfied because "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding . . . are per se protected as petitioning activity by the anti-SLAPP statute. [Citations.]" (*Cabral v. Martins.*, *supra*, 177 Cal.App.4th at p. 480.) Our courts look to the litigation privilege (Civ. Code, § 47, subd. (b)) as an aid in construing the scope of the anti-SLAPP statute. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323.)

Appellant argues that Ballantine's concealment of the bankruptcy proceeding was tortious conduct rather than a privileged communication. The argument fails because concealment and misrepresentation of facts by an attorney in the course of litigation falls within the litigation privilege (See *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420 [attorney misrepresented or concealed material facts during settlement negotiations]; *Doctor's Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1299 [insurer's concealment of insured's liability; insured was instructed to lie in deposition].)

Citing *Kimmel v. Goland* (1990) 51 Cal.3d 202, 205, appellant argues that the litigation privilege "does not bar recovery for injuries from tortious *conduct*. . . ." In *Kimmel*, our Supreme Court concluded that the litigation privilege did not shield defendant from liability for illegally taping a confidential telephone conversation. (*Id.*, at p. 209.) The court limited its holding "to the narrow facts before us involving noncommunicative acts -

the illegal recording of confidential telephone conversations - for the purpose of gathering evidence to be used in future litigation." (*Id.*, at p. 205.)

A threshold issue in determining the applicability of the litigation privilege is whether Ballantine's conduct was communicative or noncommunicative. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058.) The fraud complaint alleges that Ballantine concealed "the filing of the bankruptcy proceeding in order to induce [appellant] to enter into the Settlement Agreement with his client Sullivan and so that [appellant] would not file a proof of claim in the Sullivan bankruptcy by which he would have been paid from a sale of the Sullivan residence . . . ." The action is premised on fraudulent conduct aimed at settlement and comes within the litigation privilege. (§ 425.16, subd. (e)(2); see e.g., *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 964-967 [attorney negotiating a secret settlement]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [same].) The trial court did not err in finding that the anti-SLAPP statute applies to fraudulent statements allegedly made during a mediated settlement. (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 842 see also *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193 [action based on attorney violation of Business & Professions Code]; *G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 619 [attorney's alleged failure to comply with rule of court barred by litigation privilege].)

#### *Probability of Prevailing on Claim*

Appellant also failed to show facts which, if proven, would support a judgment in his favor. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Had Ballantine told appellant that "no bankruptcy action is pending" (a positive fraud), it would be a communicative act subject to the litigation privilege. The failure to disclose (a negative fraud) also comes within the litigation privilege. "[I]f the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are relatively related to the communicated conduct. . . [Citations.]" (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1065.) The litigation privilege is a substantive defense that appellant must overcome to demonstrate a probability of prevailing. (*Flatley v. Mauro, supra*, 39 Cal.4th 299, 323.)

Appellants cannot make the necessary evidentiary showing because the mediation privilege provides that anything said in the course of, or pursuant to mediation is

inadmissible. (Evid. Code, § 1119, subd. (a).)<sup>2</sup> "[Evidence Code] Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation." (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13.)

The judgment is affirmed. Ballantine is awarded costs on appeal.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

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<sup>2</sup> Evidence Code section 1119, subdivision (a) states in pertinent part: "No evidence of anything said . . . in the course of, or pursuant to a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given."

Thomas P. Anderle, Judge  
Superior Court County of Santa Barbara

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Nelson, Comis, Kettler & Kinney; Anson M. Whitfield, for Appellant.

John F. Shellabarger, for Respondent.